

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)	
)	
Amendment of the Commission's <i>Ex Parte</i>)	GC Docket No. 10-43
Rules and Other Procedural Rules)	
)	
Amendment of Certain of the Commission's)	GC Docket No. 10-44
Part 1 Rules of Practice and Procedure and)	
Part 0 of Commission Organization)	
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**COMMENTS OF THE ACCESS TO RECORDS COMMITTEE OF THE FEDERAL
COMMUNICATIONS BAR ASSOCIATION**

The Access to Records Committee ("Committee") of the Federal Communications Bar Association ("FCBA" or "Association")¹ hereby files these comments in the above-captioned proceedings.

I. INTRODUCTION

The FCBA is a volunteer organization of over 2,200 attorneys, engineers, consultants, economists, and law students involved in the study, development, interpretation and practice of communications and information technology law and policy. Although the majority of FCBA

¹ The FCBA is a non-profit, non-stock corporation organized under the laws of the District of Columbia, and has been in existence since 1936. These comments were prepared by FCBA's Access to Government Committee under the direction of the FCBA's Executive Committee. The FCBA's Access to Government Committee reviews actions and proposed actions of the FCC and other agencies and departments of the federal government relating to the collection of information from licensees, applicants and others engaged in providing communications services, and actions and proposed actions of such governmental bodies affecting the availability of and access to records and information. Although the FCBA provided its members with an opportunity to review and provide input with respect to these comments, the views expressed herein ultimately do not represent the views of all FCBA members. Additionally, no government-employee members of the Association participated in the preparation and filing of these comments.

members practice in the metropolitan Washington, D.C. area, the Association has eight active regional chapters, including Atlanta, Denver, Midwest, New England, New York, Northern California, Pacific Northwest, and Texas. The FCBA represents the significant portion of public participants who interact with the FCC and participate in FCC proceedings. As such, reforms to the FCC's *ex parte* and procedural rules are of great interest and importance to FCBA members.

The Committee applauds the FCC's intention to modernize its procedures and enhance the transparency and openness of its proceedings.² The *Ex Parte NPRM* and the *Procedures NPRM* are both framed around these worthy objectives.³ The Committee believes that any reforms adopted by the Commission should help ensure the development of a full and complete record in each proceeding consistent with the principles of the Administrative Procedure Act.⁴ In addition, the Committee believes in maximizing public participation in the FCC's decision-making process. To do so, the Commission must be aware of and minimize any unintended burdens of the new requirements.

To assist the FCC in improving its processes and procedures, the Committee has participated in the FCC's workshops on FCC Reform, reviewed the *NPRMs* as well as the comments and reply comments filed in the proceeding and surveyed the FCBA membership on the issues raised by the *NPRMs*.

² Amendment of the Commission's *Ex Parte* Rules and Other Procedural Rules, GC Docket No. 10-43, *Notice of Proposed Rulemaking*, FCC 10-31 (rel. Feb. 22, 2010) ("*Ex Parte NPRM*"); Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization, GC Docket No. 10-43, *Notice of Proposed Rulemaking*, FCC 10-31 (rel. Feb. 22, 2010) ("*Procedures NPRM*").

³ *Ex Parte NPRM* ¶ 1 (stating that the purpose of the proceeding is "to improve the transparency and effectiveness of the Commission's decision making by reforming our *ex parte* rules."); *Procedures NPRM* ¶ 1 ("The proposals are intended to increase efficiency and modernize our procedures, enhance the openness and transparency of Commission proceedings, and clarify certain procedural rules.").

⁴ See 5 U.S.C. § 556(e) (The official record "constitutes the exclusive record for decision" and when "an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary").

Above all else, the Committee specifically notes its support for the FCC's desire to enhance the use of electronic filing and recordkeeping databases.⁵ Simply put, electronic filing provides the best means of openness, transparency, and access. This was keenly demonstrated with the Commission's recent release of ECFS 2.0 – a tremendous step forward for the FCC's filing/access system. As the FCC continues to move forward, it should have a committed preference for electronic filing to the point where it is the rule with only limited and specified exceptions.

II. *Ex Parte* Rules Proceeding

A. The FCC's *Ex Parte* Rules Generally Work Well.

In the Committee's view, there is no widespread problem with the FCC's current *ex parte* rules.⁶ The record demonstrates a good track record of compliance.⁷ The filing process is generally easy for the public to use.⁸ The record submissions generally provide a good basis for a complete record on which the FCC may base its decisions. And the electronic databases generally make the complete record available to the public in a timely manner.⁹ The *NPRM* thus wisely does not seek radical reform of the existing rules. Rather, it appropriately seeks incremental improvements that are aimed at modernization and efficiency.

B. Clarity is Important.

The proposed rules generally offer enhanced clarity by providing greater definition of when and how *ex parte* submissions must be filed. For example, the proposed revisions offer

⁵ *Ex Parte NPRM* ¶¶ 15-22; *Procedures NPRM* ¶¶ 5, 9-16.

⁶ *Ex Parte NPRM* ¶ 5; ITTA Comments, GC Docket No. 10-43, at 2; Qwest Comments, GC Docket No. 10-43, at 2-3.

⁷ ITTA Comments, GC Docket No. 10-43, at 2; Public Knowledge Comments, GC Docket No. 10-43, at 7-8; Qwest Comments, GC Docket No. 10-43, at 2-3.

⁸ Verizon Comments, GC Docket No. 10-43, at 2; Sprint Comments, GC Docket No. 10-43, at 4-5.

⁹ Verizon Comments, GC Docket No. 10-43, at 2; Sprint Comments, GC Docket No. 10-43, at 5.

guidance on how to make permit-but-disclose filings sufficiently specific to provide a context for the arguments made in *ex parte* meetings.¹⁰ This change should ensure that the record accurately and completely reflects the issues as fully developed in *ex parte* meetings. Clarifying that parties cannot solicit staff to request presentations during the Sunshine Period is also an appropriate revision of the rules.¹¹

In the Committee's view, the creation of a complete record also requires that contacts from other government staff and officials be disclosed.¹² The views of the executive branch, legislators and other independent agencies can obviously have a great deal of. Therefore, the public needs to be aware of these contacts so it can understand the context in which they were made and the thinking that went into them. Moreover, because the record in a proceeding must provide the basis upon which the decision was made – the lack of transparency due to non-disclosure of government contacts thwarts the development of a full record, running counter to the intent of the Administrative Procedure Act.¹³

The FCC also could provide greater clarity – and avoid unnecessary contacts – by providing more details regarding the status of proceedings online. This improvement could be done without any changes to the FCC's existing rules and would decrease the number of status inquiries made to FCC staff and the circumstances on which such inquiries may cross over the line defining legitimate status inquiries.

C. Electronic Filing is Critical.

The Committee cannot overemphasize the point that electronic filing provides the best means for openness and transparency.

¹⁰ *Ex Parte NPRM* ¶¶ 6-12.

¹¹ *Id.* ¶ 10.

¹² See Marcus Spectrum Solutions Comments, GC Docket No. 10-43, at 5-6 (advocating closing the NTIA loophole).

¹³ See 5 U.S.C. § 556(e).

The FCC has embraced electronic filing, especially with the implementation of ECFS 2.0. The enhanced electronic filing proposals in the *NPRM* are a good next step.¹⁴ Moreover, the FCC should take the additional step of requiring that all *ex parte* filings be electronic unless a party can demonstrate why a specific exemption should apply (*e.g.*, hardship, confidentiality).¹⁵ The FCC also should take steps to ensure that its electronic filing system is scaleable so that filings are posted to the appropriate docket as quickly as possible, particularly when a high volume of submissions are received at the same time in an active proceeding.

The Committee would add one important caveat: While electronic filing should be promoted to the greatest extent possible, requiring that submissions be made in a certain format such as “native formats” could be problematic because of concerns regarding metadata and confidentiality.¹⁶ Even though there are ways to protect metadata and confidential filings, there are many members of the public who may not be familiar with how to prepare their submissions in these formats or even have access to the appropriate software. The Committee thus urges caution before adopting any specific electronic formatting requirement.

D. Some Proposed Reforms May Add Burdens to the Public.

Some of the proposals included in the *NPRM*, as currently proposed, could undermine the objectives of the FCC reform by unnecessarily adding burdens on the public, which would likely lead to a decrease in public participation in the FCC policymaking process.

¹⁴ *Ex Parte NPRM* ¶¶ 15-22.

¹⁵ ACA Comments, GC Docket No. 10-43, at 5-6; NASUCA Comments, GC Docket No. 10-43, at 4-5; NATOA Comments, GC Docket No. 10-43, at 3-4; NTCA Comments, GC Docket No. 10-43, at 5-6; Qwest Comments, GC Docket No. 10-43, at 4-6; Sprint Comments, GC Docket No. 10-43, at 4; Verizon Comments, GC Docket No. 10-43, at 2.

¹⁶ *See Ex Parte NPRM* ¶ 16; AT&T Comments, GC Docket No. 10-43, at 3; Verizon Comments, GC Docket No. 10-43, at 2-3.

For instance, the *NPRM* asks for comment on requiring staff filings following *ex parte* presentations.¹⁷ In our experience, this would be burdensome to staff and would provide a disincentive for staff members to meet with the public. While staff members should be free to submit an *ex parte* notice, they should not be required to do so.

The proposal to require notice of any *ex parte* presentation within four hours during the Sunshine Period is aimed at avoiding delay at what may be a critical time in a proceeding.¹⁸ But, such a requirement would be difficult to comply with and enforce. Determining when the four-hour clock would start and keeping track of it would be a significant bureaucratic headache. This burden could be addressed by requiring same-day electronic filing.¹⁹

The *NPRM* seeks comment on a number of proposals to require more detailed disclosure of the identity of commenters.²⁰ However, neither the FCC nor other commenters have demonstrated any need for this requirement as most commenters identify themselves in their pleadings to provide a context for their arguments.²¹ More importantly, requiring disclosure in a certain form would only add layers of administrative obstacles for the general public to overcome in order to comply with the rules.

E. Sanctions and Enforcement.

While the FCC should enforce its rules, including the *ex parte* rules, there is no demonstrated need for increased sanctions or a dedicated effort to enhanced enforcement.²² The FCC should be able to continue to address any violations within its existing remedies.

¹⁷ *Ex Parte NPRM* 13.

¹⁸ *Id.* ¶ 20.

¹⁹ Sprint Comments, GC Docket No. 10-43, at 6-7.

²⁰ *Ex Parte NPRM* ¶¶ 27-31.

²¹ Qwest Comments, GC Docket No. 10-43, at 7-9.

²² See, e.g., Qwest Comments, GC Docket No. 10-43, at 2-3. Even proponents of widespread overhaul of the *ex parte* rules agree. See Public Knowledge Comments, GC Docket No. 10-43, at 7-8.

F. New Media.

New media are providing exciting means for the public to express themselves and participate in the democratic policymaking process like never before. Appropriately, the FCC has been at the forefront of embracing new media.²³ The FCC should continue to work on means for integrating new media into its deliberative processes but should be mindful of the need to do so in an open and deliberative manner. The FCC also should ensure that the use of new media that relies on shorthand or abbreviated forms of communication (*e.g.*, Twitter transmissions, blog postings) do not supplement or take priority over more meaningful and robust methods of communication, especially where such communications are required by the Administrative Procedure Act. Further proceedings on the implications of new media on FCC proceedings should be considered. In addition, given the 24/7, instantaneous nature of new media and the need or ability to rely on new media to complement the record, the Commission should evaluate the relevance of the Sunshine Period rules in such a proceeding.²⁴

G. Systemic Proposals Should Be Rejected.

Systemic overhaul proposals are not needed and would disserve the public interest as no evidence of a widespread problem with the *ex parte* rules has been shown.

Specifically, proposals to require a digital audio or video recording of oral *ex parte* presentations would entail a significant administrative burden on the public and Commission staff.²⁵ Even with the decreasing cost of recording equipment, these proposals would still add a significant compliance cost to the public and the FCC. Members of the public may lack access

²³ *Ex Parte NPRM* ¶¶ 33-34.

²⁴ *Id.* ¶ 14 n.34.

²⁵ MAP Comments, GC Docket No. 10-43, at 2; PK Comments, GC Docket No. 10-43, at 5-7; Pierre de Vries Comments, GC Docket No. 10-43, at 10-11.

to recording devices, and the FCC would have to invest in new technology equipment and personnel to provide access to all of the recordings.

The suggestion that oral *ex parte* presentations should be abolished altogether should be similarly rejected.²⁶ Oral *ex parte* presentations add to the FCC's understanding of the issues in a proceeding and help complete the record. Abolishing these vital communications would eliminate an important means of public participation and undermine the completeness of the record.

III. Procedures Reform Proceeding

The second of the FCC reform *NPRMs* examines the Commission's internal procedures and it proposes several important changes to those processes.

As with the *Ex Parte NPRM*, the *Procedures NPRM* seeks to enhance the use of electronic filing.²⁷ As noted above, the Committee endorses electronic filing and believes it should be promoted whenever possible, including increased use of docketed proceedings, upgrades to filing systems, and the development of a user-friendly consolidated licensing system. In developing and upgrading electronic systems, the FCC should continue to actively seek out public and user input for the development process. The Committee agrees that service from the Commission and other parties by well-established and widely-adopted electronic means (*e.g.*, email) should be permitted.²⁸

By embracing greater use of electronic filing, the FCC can improve its docket management. The process for closing stale dockets and opening new dockets for unwieldy proceedings can and should be improved along the lines of the proposed reforms.²⁹ Also, public

²⁶ PK Comments, GC Docket No. 10-43, at 4-5.

²⁷ *Procedures NPRM* ¶¶ 5, 9-16.

²⁸ *See id.* ¶ 17.

²⁹ *Id.* ¶¶ 18-20.

notices should be issued before terminating dockets or transferring issues, and it would be useful for new dockets, in the first instance, to refer to their predecessor dockets so as to ensure clarity with respect to the relationships between the dockets.³⁰ This is especially important to practitioners who must research FCC pronouncements and their historical sequence in connection with a particular issue.

Finally, the Commission's proposals regarding the effective date for rules (Section 1.427),³¹ the computation of time (Section 1.4),³² and reconsideration on the FCC's own motion (Section 1.108),³³ are appropriate ministerial changes to clarify the Commission's procedures.

CONCLUSION

The Committee commends the FCC for looking for ways to improve its *ex parte* rules and internal procedures. Both *NPRMs* contain important improvements that, with some refinement, will serve the public interest well.

Respectfully submitted,

**FEDERAL COMMUNICATIONS
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³⁰ AT&T Comments, GC Docket No. 10-44, at 2-5.

³¹ *Procedures NPRM* ¶ 22

³² *Id.* ¶¶ 23-25.

³³ *Id.* ¶ 8.